In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 571

WERNER C. VON CLEMM, ET AL., PETITIONERS

v.

ELIZABETH RUDEL SMITH, TREASURER OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner von Clemm brought suit under Section 9(a) of the Trading with the Enemy Act, 50 U.S.C. App. 9(a), against the Treasurer and the Attorney General of the United States to recover the proceeds of property vested in the Alien Property Custodian. Judge Edward C. McLean, of the District Court for the Southern District of New York, found, after a six-week trial, that petitioner was an "enemy" under Section 9(a) of the Act by reason of having been an agent of the German government at the time hostilities commenced between the United States and Germany, and accordingly he dismissed the action. 255 F. Supp. 353 (App. A–3 to A–51).[1] The court of ap-

[1] "App." refers to the record appendix to petitioner's brief in the court of appeals.

peals, agreeing with the district court's findings, unanimously affirmed. 363 F. 2d 19 (Pet. App. 1b–10b).

Petitioner contends that this Court should review the decision below because the burden of proof imposed on him violates the Fifth Amendment (Pet. 14–16), and because an important question is presented concerning the definition of an "agent" of the "enemy" within the meaning of the Trading with the Enemy Act (Pet. 7–9). We submit, however, that the law as to the burden of proof is not only reasonable but well settled, and that petitioner failed to satisfy the burden imposed. In addition, on the concurrent findings of the courts below as to petitioner's activities, we think it clear that no important question of statutory interpretation is presented in this case.

Section 9(a) of the Trading with the Enemy Act permits "any person not an enemy,"[2] who claims an interest in property seized and sold under the Act, to institute suit for the recovery of the proceeds of the sale. Under familiar principles, the claimant has the burden of establishing all elements of his cause of action, including his non-enemy status. See, *e.g.*, *Societe Internationale* v. *Rogers*, 357 U.S. 197, 212; *Sarthou* v. *Clark*, 78 F. Supp. 139, 141–142 (S.D. Cal.); *Manufacturers Trust Co.* v. *Rogers*, 181 F. Supp. 116, 121 (S.D.N.Y.), affirmed, 291 F. 2d 460 (C.A. 2); *Bosch* v. *Rogers*, 169 F. Supp. 877, 879 (D.D.C.). The Act

[2] "Enemy" is defined in Section 2 of the Act, 50 U.S.C. App. 2, as, *inter alia*—"(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof."

extends to citizens and non-citizens alike. See, *e.g.*, *Stoehr* v. *Wallace*, 255 U.S. 239; *Manufacturers Trust Co.* v. *Rogers, supra*, 181 F. Supp. 116, 122 & n. 6; *Duisberg* v. *United States*, 89 F. Supp. 1019, 1022 (Ct. Cl.), certiorari denied, 340 U.S. 890. This Court has expressly upheld the fairness of the procedures of the Act against a challenge that it violated a citizen's Fifth Amendment rights. *Stoehr* v. *Wallace, supra.* Thus, petitioner's contention that—

> When the claimant * * * proves that he is a U.S. resident and citizen, and denies the allegation that he is an enemy agent,[3] the burden of going forward with evidence to prove the contrary should be upon the Alien Property Custodian" [Pet. 16]

—finds no support in the statute, is contrary to settled case law, and is certainly not compelled by the Constitution.

Petitioner asserts that the courts below found he was an agent of Germany "as a result of activities engaged in prior to the declaration of war" (Pet. 16), and then indulged in a "presumption" (Pet. 10, 15–16) that petitioner continued his activities after the outbreak of the war. We think it clear that the courts below, as in comparable cases,[4] considered the pre-

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[3] The quotation implies that the allegation of enemy status is made by the government. In fact, however, the claimant under the Act alleges in his complaint his non-enemy status. See, *e.g.*, *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 482.

[4] See, *e.g.*, *Sarthou* v. *Clark, supra; Bosch* v. *Rogers, supra; Manufacturers Trust Co.* v. *Rogers, supra.*

war activity as highly relevant background[5] against which to judge petitioner's activity after December 11, 1941; they invoked no presumption, but rather drew from that background, viewed in relation to activity occurring within the later period, legitimate inferences which naturally arise from a long-continued course of conduct.

The evidence adduced at trial showed that late in 1940 and early in 1941 petitioner—in violation of prohibitions contained in wartime "freezing" regulations (see Executive Order 8389, 12 U.S.C. 95a note)—imported into the United States on three occasions diamonds of Belgian origin.[6] The trial court found that, in selling or attempting to sell these diamonds in the United States, petitioner acted as an agent of the German government pursuant to a plan conceived and put into operation by the German occupation authorities in Belgium, and that he knew that the dollar

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[5] Judge McLean properly stated: "In judging the significance and effect of what he [petitioner] did after December 11, we cannot properly be asked to shut our eyes to everything that went before." 255 F. Supp. at 370 (App. A-40).

[6] Petitioner cleared the first diamond shipment through Customs and sold the diamonds in the United States. This transaction led to petitioner's trial and conviction for a conspiracy to violate Executive Order 8389. *United States* v. *von Clemm*, 136 F. 2d 968 (C.A. 2), certiorari denied, 320 U.S. 769.

The second and third diamond shipments were seized by Customs, and were later vested in and liquidated by the Alien Property Custodian. Petitioner's present suit seeks, in part, the return of these liquidation proceeds. In addition, petitioner seeks the return of the sales proceeds of several shipments of semi-precious and synthetic stones—discussed in the text, *infra*—which were consigned to petitioner from Germany in 1941, detained by Customs, and subsequently vested in and sold by the Alien Property Custodian.

proceeds would be channeled to the German government (App. A–20 to A–24). Petitioner challenged this finding on appeal, and the court of appeals found the lower court's factual conclusions "unassailable" (Pet. App. 6b) and rejected petitioner's attack on them as "frivolous" (*ibid.*).

Similarly, petitioner disputed on appeal the trial court's findings that in 1940 to 1941 he acted as the exclusive agent of the German Ministry of Economics for the import of semi-precious and synthetic stones (App. A–25 to A–32); that after June 14, 1941, when the freezing controls contained in Executive Order 8389 were made applicable to Germany, these imports were transshipped through Switzerland (App. A–28 to A–30), and brought into the United States under the false representation that petitioner's Swiss partner had previously paid for the stones in Switzerland (App. A–31); and that proceeds from these sales were transferred to a "cloaking account" maintained by the German Navy in Switzerland (*ibid.*). Petitioner denied knowledge that the German Navy was the beneficiary of the sales. The trial court, however, did not believe him, especially in light of the fact that the code name of the German Navy's fund—"Jalmac"—appeared in petitioner's books of account (Pet. App. 7b–8b).[7]

[7] Judge McLean's conclusions as to petitioner's pre-December 11 activity are highly illuminating. In addition to the findings summarized in the text above, the judge stated (App. A–37 to A–38):

> Von Clemm's dealings were more than the normal operations of an American citizen engaged in the import business solely for the purpose of private gain. It may be that

As to petitioner's activities after the outbreak of hostilities, the trial court concluded from the evidence that petitioner, "* * * as far as he was able in the brief period available to him, between the declaration of war on December 11, 1941 and his indictment on April 24, 1942, tried to carry on as well as he could with what he had previously been doing" (App. A–40).[8] Petitioner's claim that he had severed his connections with the German government after December 11 was supported only by his personal denials—testimony which the trial court found unworthy of belief in light of all the evidence (App. A–42 to A–43). The court

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von Clemm sought a personal profit out of his transactions. If he did, evidence indicates that he was unsuccessful. I believe that the profit motive was mingled in his mind with a desire to be of service to Germany. But whatever his motives, we must consider his acts. In the diamond transactions, he acted on behalf of the German Government in collaboration with his brother in Germany. This court so found in the criminal case with respect to the first diamond shipment. A similar finding is justified, and indeed compelled, by the evidence here as to the other diamond shipments. As to the semi-precious stones, von Clemm knew that were it not for the direction of the German Government, he would not be sole importer of this merchandise. He insisted on being sole importer. He gave advice to his "tanwo friends" (*i.e.*, the German Economics Ministry), on how to conduct "economic warfare." He knew that at least some of the dollars that he paid for the stones ultimately were deposited to the credit of the German Navy. [Footnote omitted.]

[8] The indictment referred to by Judge McLean was for petitioner's conspiracy to violate Executive Order 8389; see note 6, *supra*.

of appeals, after a detailed review of the evidence as to petitioner's post-December 11 conduct (Pet. App. 8b–9b) stated that "part of [the evidence] tends to show that he ceased his importing operations, and part the opposite, although none of the evidence is conclusive" (Pet. App. 8b). But the court correctly refused to substitute its own inferences for those drawn by the trier of the facts, *Commissioner* v. *Duberstein*, 363 U.S. 278, 291, and held that it "was not error for the District Court to conclude that [petitioner] had not met his burden of proving non-enemy status" (Pet. App. 10b).

Petitioner asks this Court to review these factual determinations.[9] There is no occasion, however, to depart from the precept that this Court will not ordi-

[9] Petitioner relies repeatedly (Pet. 3, 8–9, 13, 15) on language contained in a recommended decision prepared by a hearing examiner of the Office of Alien Property in 1955, in connection with the administrative claim for the return of the vested property filed by petitioner with that Office. That reliance is wholly misplaced. The recommended decision was never adopted by the Director of the Office of Alien Property or by the Attorney General. Much of the evidence introduced by the government at the present trial to contravene petitioner's assertion of his non-enemy status was newly discovered, and had not been available at the time of the administrative proceeding. Moreover, a suit under Section 9(a) of the Trading with the Enemy Act is a trial *de novo*. *International Mortgage & Investment Corp.* v. *Von Clemm*, 301 F. 2d 857, 859 (C.A. 2). We note that the hearing examiner's decision recommended denial of petitioner's claim on the merits for lack of beneficial ownership of the vested property, an issue the courts below did not reach.

narily review the concurrent findings of the lower courts. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.[10]

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

NOVEMBER 1966.

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[10] It is apparent that no novel or important question is presented in this case as to the scope of the Trading With the Enemy Act (compare Pet. 7). The Act defines enemy to include an agent of an enemy government; see note 2, *supra*. Manifestly, the term includes one who, like petitioner, knowingly renders economic aid to a country with which the United States is at war, for the basic purpose of the Act was to keep assets and other resources from those countries. *Uebersee Finanz-Korp.* v. *McGrath*, 343 U.S. 205; *Clark* v. *Uebersee Finanz-Korp.*, 322 U.S. 480, 484–485.

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